

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BOBBY L. RIGNEY)	
Claimant)	
VS.)	
)	Docket No. 1,044,080
M & M WELL SERVICE, INC.)	
Respondent)	
AND)	
)	
UNKNOWN)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Kansas Workers Compensation Fund (Fund) requests review of the May 3, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

In the May 3, 2010 preliminary hearing Order, the ALJ found that the respondent is subject to the Kansas Workers Compensation Act (Act). Additionally, the ALJ found the evidence indicated respondent is uninsured and financially unable to pay benefits. The ALJ ordered the Fund to pay claimant's medical and temporary total disability benefits.¹ The Order also stated that the ALJ's June 3, 2009 Order remained in full force and effect.²

The Fund requests review of the preliminary hearing Order and first alleges the ALJ erred in finding the Act applied to the claim. The Fund argues the respondent did not have

¹ ALJ Order (May 3, 2010).

² The June 3, 2009 Order set forth that (1) claimant was entitled to workers compensation benefits, (2) the parties were covered by the Workers Compensation Act, (3) claimant presented evidence that respondent was uninsured, (4) the court could not find respondent was financially unable to pay compensation to claimant and (5) temporary total disability benefits were awarded at the rate of \$326.68 per week.

sufficient payroll during 2007 and 2008 to be subject to the Act. Second, the Fund alleges the ALJ did not have jurisdiction to enter a preliminary hearing Order against the Fund because claimant failed to meet his burden of proof as to the average weekly wage. Third, the Fund alleges the ALJ did not have the authority to require the Fund to pay medical and temporary total disability benefits and other compensation to the claimant. Accordingly, the Fund requests the Order be reversed and set aside.

The claimant requests the ALJ's Order be affirmed, alleging the claim is subject to the Act and respondent is uninsured and unable to pay benefits.

The issues before the Board on this appeal are:

- Whether the claim is subject to the Kansas Workers Compensation Act.
- Whether the ALJ exceeded her jurisdiction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Application of the Act

The threshold question in this matter is whether the Kansas Workers Compensation Act applies to this claim. Under K.S.A. 2008 Supp. 44-501(a) claimant bears the burden of proof to establish his right to an award of compensation.

Claimant's burden to prove coverage under the Act includes whether respondent has the requisite payroll requirements as set forth in the Act.³ K.S.A. 44-505(a) exempts from application of the Kansas Workers Compensation Act the following:

(2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection.

K.A.R. 51-11-6 states in pertinent part:

³ *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 154, 613 P.2d 389 (1980).

The provision in K.S.A. 44-505 excluding the payroll of workers who are members of the employer's family shall not apply to corporate employers.

The Fund contends respondent did not have sufficient payroll for the parties to be subject to the Act. Although the evidence is not particularly clear, the preponderance of the evidence establishes that respondent had a payroll in excess of \$20,000 in 2007 and 2008. This is a claim for a November 26, 2008 accident. The record indicates claimant averaged working around 35 hours a week, was considered full time, and made \$14 an hour.⁴ Claimant began working for the respondent in May 2008.⁵ In addition, the testimony of Richard L. McCoy, who owned the respondent company with his wife, indicated that Mr. McCoy had two other individuals work for him in 2007 and/or 2008, in addition to his two sons.⁶ The two individuals were paid from \$12 to \$14 an hour. Mr. McCoy's sons were paid \$10 an hour.⁷ Furthermore, an application for a workers compensation insurance policy, which Mr. McCoy testified was completed by his wife, indicated Mr. McCoy received \$25,000 remuneration from M & M Well Service, Inc. His wife did not receive any remuneration from the corporation.⁸ The Fund points to the quarterly wage reports respondent submitted to the Kansas Department of Labor to support its position. The wage reports do reflect a payroll of less than \$20,000. However, the wage reports do not provide data on all of the employees identified by Mr. McCoy.

This Board Member is persuaded that the respondent had a payroll of more than \$20,000 in the years 2007 and 2008. Thus, the Kansas Workers Compensation Act does apply to this claim and the ALJ's conclusion in this regard is affirmed.

Jurisdiction

This is an appeal from a preliminary hearing. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2009 Supp. 44-551(i)(2)(A). In addition K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. The awarding of temporary total disability benefits is not an issue the Board has the jurisdiction to review at this juncture of the proceedings.

⁴ P.H. Trans. (May 28, 2009) at 12-14; P.H. Trans. (Apr. 15, 2010) at 16, 45.

⁵ P.H. Trans. (May 28, 2009) at 6.

⁶ P.H. Trans. (Apr. 15, 2010) at 23-26.

⁷ *Id.*, at 24.

⁸ *Id.*, Cl. Ex. 3.

K.S.A. 44-534a specifically grants an administrative law judge the authority to decide at a preliminary hearing issues concerning the payment of temporary total disability compensation. Determination of claimant's average weekly wage is required to compute temporary total disability compensation. Therefore, the ALJ did not exceed her jurisdiction in implicitly determining an average weekly wage and in awarding temporary total disability benefits at the rate of \$326.68 per week. As stated above, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

K.A.R. 51-15-2 specifically grants an administrative law judge the authority to award compensation pursuant to K.S.A. 44-532a against the Fund following a preliminary hearing. Therefore, the ALJ did not exceed her jurisdiction in awarding compensation to the claimant against the Fund. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of ALJ Nelsonna Potts Barnes dated May 3, 2010, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
M & M Well Service, Inc., 341 Road 21, Sedan, KS 67361
David J. Bideau, Attorney for Fund
Nelsonna Potts Barnes, Administrative Law Judge

⁹ K.S.A. 44-534a.